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No. 99-394

In the Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL.,
PETITIONERS

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal contractor must exhaust administrative remedies before initiating judicial proceedings that raise a constitutional challenge to agency action enforcing Executive Order No. 11,246.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 174 F.3d 424. The district court's bench opinion (Pet. App. 14a-20a) and order granting petitioners' motion for preliminary injunction and denying respondents' motion for summary judgment (Pet. App. 21a-22a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 6, 1999. A petition for rehearing was denied on June 3, 1999 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on September 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Executive Order No. 11,246, as amended, prohibits federal contractors from discriminating in employment on the basis of race, color, religion, sex, or national origin, and it requires federal contractors to take affirmative action to ensure that all qualified applicants and employees are treated on a nondiscriminatory basis. 3 C.F.R. 167 (Supp. 1965). Petitioner Bank of America[1] is a federal contractor subject to Executive Order No. 11,246. Pet. App. 3a.

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is responsible for enforcing the Order. Among its other responsibilities, it conducts periodic compliance reviews to determine whether contractors are meeting their obligations. 41 C.F.R. 60-1.20. Subject to exemptions not applicable here, a contractor agrees to provide OFCCP with information and reports and to permit on-site access to its books and records so that OFCCP may determine whether the contractor is in compliance. 41 C.F.R. 60-1.43; Exec. Order No. 11,246, § 202(5). When OFCCP finds a violation, it must first seek to resolve the matter through conciliation. 41 C.F.R. 60-1.20(b). If conciliation fails, OFCCP may institute administrative enforcement proceedings within the Department of Labor. 41 C.F.R. 60-1.26(b)(2). The final administrative order is subject to federal judicial review. 5 U.S.C. 704; 41 C.F.R. 60-30.30.

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[1] As set forth in the petition (Pet. ii), the original plaintiffs were NationsBank Corporation, NationsBank, N.A., and NationsBank of Florida, N.A. As a result of various mergers, the reconstituted entities are Bank of America, N.A., and Bank of America Corporation, which are collectively referred to herein as "Bank of America" or "Bank."

2. In 1994, OFCCP conducted a compliance review of Bank of America's headquarters in Charlotte, North Carolina. Bank of America fully cooperated with this review, and it permitted inspection of documents and an onsite investigation. In October 1994, OFCCP notified Bank of America of its finding that the Bank had discriminated against minority applicants at its Charlotte facility in violation of the Executive Order. Pet. App. 3a. OFCCP's efforts at conciliation failed in March 1996. On the basis of its findings of discrimination, OFCCP subsequently referred the matter to the Solicitor of Labor, who filed an administrative complaint on July 18, 1997. *Id.* at 3a-4a.

In December 1994 and January 1995, OFCCP informed Bank of America that it had selected two of the Bank's other facilities in Tampa, Florida, and Columbia, South Carolina, for compliance reviews. The Bank, however, informed OFCCP that it would not cooperate with these reviews and would not provide information unless OFCCP notified it of the specific criteria OFCCP had used in selecting those facilities. Pet. App. 3a.

3. In March 1995, Bank of America sought declaratory and injunctive relief in the District Court for the Western District of North Carolina. It alleged that OFCCP's selection of its Tampa and Columbia facilities violated the Bank's Fourth Amendment rights on the theory that the selections were not based on specific neutral criteria or a reasonable administrative plan. See generally *United States* v. *Harris Methodist Ft. Worth*, 970 F.2d 94, 99-103 (5th Cir. 1992); *First Ala. Bank of Montgomery* v. *Donovan*, 692 F.2d 714 (11th Cir. 1982). In January 1996, the district court denied OFCCP's motion to dismiss for Bank of America's failure to exhaust administrative remedies. Pet. App. 4a. In April 1996, OFCCP notified Bank of America

that it was withdrawing the compliance review notices for the Tampa and Columbia facilities. *Ibid.*

In May 1997, Bank of America amended its complaint to allege, for the first time, that OFCCP's 1993 selection of the Bank's Charlotte headquarters for review also violated the Fourth Amendment. On July 21, 1997, the Department of Labor moved for summary judgment, arguing, *inter alia*, that, with respect to the Charlotte facility, Bank of America should be required to exhaust its administrative remedies in the pending administrative proceeding before obtaining judicial review. In September 1997, Bank of America filed a motion for a preliminary injunction to stay the administrative action pending a decision by the district court. Pet. App. 4a.

On November 14, 1997, the district court denied the government's motion for summary judgment and granted Bank of America's motion for a preliminary injunction. Pet. App. 4a, 14a-22a. The district court declined to require Bank of America to exhaust its administrative remedies with respect to the Charlotte facility. *Id.* at 16a-17a. The court's analysis focused on the fact that the Bank's complaint raised a constitutional claim and on the court's concerns about the motives and timing of OFCCP's actions. *Ibid.* The court raised doubts as to whether an administrative review would provide an "independent determination" of the constitutional issues and added that judicial review of the final administrative decision would be "inadequate" because the standard of review would be deferential to the agency's factual findings. *Ibid.*

4. The court of appeals reversed. It ruled that, under well-established precedent, a party must exhaust administrative remedies before challenging agency action pursuant to Executive Order No. 11,246, and it

further held that there was no waiver or exemption from exhaustion requirements for alleged constitutional violations. Pet. App. 7a-10a. The court also rejected petitioners' contention that OFCCP's supposedly "questionable behavior" warranted an exception to exhaustion of the Bank's administrative remedies. *Id.* at 11a. The court explained that "mere agency misbehavior does not justify waiver," and that one purpose of exhaustion is to allow agencies to correct their own mistakes prior to judicial review. *Id.* at 12a.

ARGUMENT

The court of appeals held that petitioners must exhaust administrative remedies before seeking federal court review of a constitutional challenge to a completed agency inspection. That holding is correct, and it does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Because of the important purposes served by the exhaustion requirement, waiver of that requirement is appropriate only in certain defined circumstances in which the individual's interest in immediate access to the federal courts outweighs the institutional interests in judicial efficiency and administrative autonomy. See *McCarthy* v. *Madigan*, 503 U.S. 140, 146-148 (1992).

The exhaustion rule is generally applicable to ordinary disputes concerning the enforcement of Executive Order No. 11,246, see *Volvo GM Heavy Truck Corp.* v. *United States Dep't of Labor*, 118 F.3d 205 (4th Cir.

1997), and petitioners do not appear to argue otherwise. Petitioners nonetheless contend (Pet. 7-8) that the exhaustion rule should not apply to them because their district court complaint presented *constitutional* claims. That contention is without merit. As the courts of appeals have consistently held, parties must first exhaust administrative remedies before seeking federal court review of a Fourth Amendment challenge to a completed agency search or inspection.[2] Those courts have correctly reasoned that the policies underlying the exhaustion rule—including the benefit of agency expertise to address matters raised, correct errors, and provide a complete record for judicial review, together with the interest in avoiding premature judicial resolution of constitutional claims—are best served by

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[2] See *In re Worksite Inspection of Quality Prods., Inc.*, 592 F.2d 611, 615 (1st Cir. 1979) (constitutional challenge to completed OSHA inspection must be addressed initially by administrative forum); *In re Gould Pub. Co.*, 934 F.2d 457, 459-461 (2d Cir. 1991) (same); *In re Establishment Inspection of Metal Bank of Am., Inc.*, 700 F.2d 910, 914-915 (3d Cir. 1983) (same); *Baldwin Metal Co.* v. *Donovan*, 642 F.2d 768, 777 (5th Cir.) (same), cert. denied, 454 U.S. 893 (1981); *In re Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 802 (6th Cir. 1997) (same); *In re Establishment Inspection of Kohler Co.*, 935 F.2d 810, 812-814 (7th Cir. 1991) (same (and abandoning, in relevant part, previous position that had been in conflict with other circuits)); *Marshall* v. *Central Mine Equip. Co.*, 608 F.2d 719, 721-722 (8th Cir. 1979) (same); *In re J.R. Simplot Co.*, 640 F.2d 1134, 1137 (9th Cir. 1981) (same), cert. denied, 455 U.S. 939 (1982); *Robert K. Bell Enters., Inc.* v. *Donovan*, 710 F.2d 673, 674-675 (10th Cir. 1983) (same), cert. denied, 464 U.S. 1041 (1984); see also *Volvo GM Heavy Truck Corp.* v. *United States Dep't of Labor*, 118 F.3d 205 (4th Cir. 1997) (contractor's due process challenge to alleged delay in OFCCP complaint first must be presented to administrative forum).

requiring contractors to assert constitutional challenges initially in an appropriate administrative forum.[3]

Despite petitioners' suggestion to the contrary (Pet. 8), nothing in *McCarthy*, *supra*, or *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), supports any general exception to the exhaustion rule for constitutional claims. In *McCarthy*, the Court held that a prisoner who has filed a damages action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), need not first exhaust an administrative remedy procedure offered by the Bureau of Prisons. The Court ruled not that the exhaustion requirement is inapplicable to constitutional claims, but that, "given the type of claim [the prisoner] raises and the particular characteristics of the Bureau's general grievance procedure, [the prisoner's] individual interests outweigh countervailing institutional interests favoring exhaustion." 503 U.S. at 149. And, in *Patsy*, the issue was whether, and to what extent, Congress had intended to require parties to exhaust state administrative remedies before filing suit under 42 U.S.C. 1983; this Court's decision on that issue has little bearing on the application of exhaustion principles outside that statutory context.

2. Petitioners next suggest (Pet. 8-9) that the exhaustion rule is inapplicable where no administrative proceedings are pending at the time a party files its judicial complaint. As an initial matter, the court of appeals did not address that argument, which petitioners had not pressed in their merits brief, and this Court "do[es] not decide in the first instance issues not decided below." See *NCAA* v. *Smith*, 119 S. Ct. 924,

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[3] See, *e.g.*, *Gould*, 934 F.2d at 460; *Metal Bank*, 700 F.2d at 914-915.

930 (1999); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).[4]

In any event, this Court and others have rejected the notion that plaintiffs can avoid the administrative process by filing a judicial action before formal administrative proceedings are initiated. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (initiation of district court action cannot enjoin and avoid administrative process not yet initiated under Federal Mine Safety and Health Amendments Act of 1977); *Kohler Co.*, 935 F.2d at 812 (absence of formal administrative proceedings to raise Fourth Amendment challenge to completed OSHA inspection does not negate exhaustion requirement); *National Bank of Commerce* v. *Marshall*, 628 F.2d 474, 476, 478 (5th Cir. 1980) (federal contractor must exhaust administrative process even if judicial action challenging validity of Executive Order No. 11,246's implementing regulations is filed before a formal administrative complaint), cert. denied, 454 U.S. 1053 (1981). Carving out an exception to the exhaustion rule in such circumstances would thwart the basic policies underlying the rule, including the preservation of agency independence, the avoidance of piecemeal litigation, and the judicial interest in preventing pre-

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[4] Petitioners are in fact incorrect in asserting that administrative proceedings had not yet begun when they filed their amended complaint. While a formal administrative complaint had not yet been filed against Bank of America when the Bank amended its judicial complaint to challenge the completed search of the Charlotte headquarters, the administrative *process* had been underway for several years: OFCCP had given notice of intent to review the Charlotte facility in 1993; the search in issue was conducted in 1994; and lengthy but unsuccessful negotiations for a settlement lasted into 1996.

mature and perhaps unnecessary review of constitutional claims.

3. Finally, petitioners argue for an exemption from the exhaustion rule on the theory that any relief they could obtain in the administrative forum would be a "different and much lesser remedy" than the relief they have sought in the district court. Pet. 10. The court of appeals did not address that argument, however, because petitioners did not squarely present it below; for example, petitioners did not claim that exhaustion would be "futile" on the ground that money damages would be unavailable in the administrative proceedings. Petitioners' current argument is therefore not properly before this Court, as it was "not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); accord *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

In any event, petitioners are incorrect in asserting (Pet. 9) that "the only administrative 'remedy' available to Bank of America now that the OFCCP has commenced administrative proceedings is the possible exclusion of the unconstitutionally-obtained evidence from the administrative proceedings."[5] To the con-

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[5] Despite petitioners' contention (Pet. 9) that the only administrative remedy available is the possible exclusion of unconstitutionally obtained evidence, they themselves recently urged the administrative law judge reviewing this matter to "*dismiss* the * * * administrative action based on the OFCCP's unconstitutional selection and search of Bank of America's Charlotte head

trary, a final administrative ruling dismissing the action on Fourth Amendment grounds would have the same practical effect as the judicial relief that petitioners have specifically sought: a declaratory judgment that "the OFCCP violated [their] Fourth Amendment rights" (Pet. 10), and a court order "enjoin[ing] the OFCCP from doing so again" (*ibid.*). It is true that petitioners might be unable to obtain money damages or attorneys' fees in the administrative proceedings. See Pet. 10-11. But petitioners did not even specifically request that relief in their complaint, and the unavailability of such relief in the administrative setting could therefore provide no basis for an exemption from the exhaustion rule even if petitioners had preserved the issue in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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quarters for an affirmative action compliance review." Motion for Summary Decision 1 (Sept. 8, 1999) (emphasis added).

As we observed below (see Gov't C.A. Br. 28 n.9), it is unclear whether an exclusionary remedy could be appropriate in non-criminal cases of this kind in any forum, including a judicial forum. See generally *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).